

# IN THE SUPREME COURT OF TEXAS

=====  
No. 97-1187  
=====

MELLON MORTGAGE COMPANY, PETITIONER

v.

ANGELA N. HOLDER, F/K/A ANGELA N. HAMILTON, INDIVIDUALLY AND A/N/F FOR  
NICHOLAS C. LASKE, RESPONDENT

=====  
ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS  
=====

**Argued on January 12, 1999**

JUSTICE ABBOTT delivered a plurality opinion, in which JUSTICE HECHT and JUSTICE OWEN  
join.

JUSTICE ENOCH filed a concurring opinion.

JUSTICE BAKER filed a concurring opinion.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE PHILLIPS and JUSTICE  
HANKINSON join.

JUSTICE GONZALES did not participate in the decision.

While driving late one night in the downtown Houston area, Angela Holder was stopped for  
an alleged traffic violation by Calvin Potter, an on-duty Houston police officer. Potter took Holder's  
insurance and identification cards and told her to follow his squad car. Holder followed Potter

several blocks to a parking garage owned by Mellon Mortgage Company. Once inside the garage, Potter sexually assaulted Holder in his squad car.

Holder sued Mellon and the City of Houston but did not sue her attacker. The trial court granted summary judgment for Mellon and the City on all of Holder's claims. The court of appeals affirmed the summary judgment in favor of the City on the basis of sovereign immunity. With regard to Holder's claims against Mellon, the court of appeals affirmed the summary judgment on Holder's negligence per se claim, but reversed on the negligence, gross negligence, and loss of consortium<sup>1</sup> claims. On petition for review to this Court, Mellon claims, among other things, that it owed no legal duty to Holder. Because we hold that it was not foreseeable to Mellon that a person would be accosted several blocks from Mellon's garage and forced to drive to that garage where she would be sexually assaulted, Mellon owed no duty to Holder to prevent the attack. Accordingly, we reverse the court of appeals' judgment and render judgment that Holder take nothing.<sup>2</sup>

## I

With regard to criminal acts of third parties, property owners owe a duty to those who may be harmed by the criminal acts only when the risk of criminal conduct is so great that it is both unreasonable and foreseeable. See *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998). We focus our attention in this case on "foreseeability." For most premises liability cases, the foreseeability analysis will be shaped by determining whether the plaintiff was an invitee,

---

<sup>1</sup> Holder sued for loss of consortium as next friend for her minor son.

<sup>2</sup> Holder did not request this Court to review the part of the court of appeals' judgment that was adverse to her. As a result, that portion of the court of appeals' judgment is undisturbed.

a licensee, or a trespasser. Because Holder was an unforeseeable victim regardless of her status, it is unnecessary to determine into which of the three categories she falls. Instead, we focus on general foreseeability principles that limit the scope of the defendant’s duty in this case.<sup>3</sup>

We have repeatedly stated that “[f]oreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable.” *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *see also Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 551 (Tex. 1985). We have also frequently stated a two-prong test for foreseeability:

[I]t is not required that the particular accident complained of should have been foreseen. All that is required is [1] “that the injury be of such a general character as might reasonably have been anticipated; and [2] that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.”

*Id.* at 551 (citations and emphasis omitted); *see also Texas Cities Gas Co. v. Dickens*, 168 S.W.2d 208, 212 (Tex. 1943); *San Antonio & A. P. Ry. Co. v. Behne*, 231 S.W. 354, 356 (Tex. Comm’n App. 1921, judgment adopted). Thus, we consider not only the foreseeability of the general criminal act but also the foreseeability that the victim might be injured by the act. Stated more broadly, we determine both the foreseeability of the general danger and the foreseeability that a particular plaintiff — or one similarly situated — would be harmed by that danger.

This duty analysis has been widely embraced since Chief Judge Cardozo penned the seminal *Palsgraf* opinion. *See Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). *Palsgraf* teaches that the duty question properly considers the foreseeability of the injured party. Mrs. Palsgraf was standing on a platform at the defendant’s railroad waiting for a train. Some distance away, porters

---

<sup>3</sup> This analysis is complementary, not contradictory, to the traditional premises liability categories. Therefore, this opinion should not be construed as supplanting the traditional premises liability analysis as it relates to a plaintiff’s status.

tried to help a passenger board a train. As they assisted him, they dislodged a package of fireworks he was carrying. The package fell to the rails and exploded, knocking over scales and injuring Mrs. Palsgraf. *See id.* at 99.

The court held that, regardless of whether the railroad might have acted in a generally wrongful manner, it was not negligent with regard to Mrs. Palsgraf. *See id.* As Chief Judge Cardozo explained, “What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to some one else . . . .” *Id.* at 100. Because the plaintiff was not so situated to the wrongful act that her injury might reasonably have been foreseen, the defendant did not owe a duty to protect her from the resulting injury. “‘Proof of negligence in the air, so to speak, will not do.’ . . . *The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.*” *Id.* at 99, 100 (emphasis added). Because the railroad owed no duty to Mrs. Palsgraf, it was unnecessary to consider any question of proximate cause.

The *Palsgraf* dissent, however, illustrates the counter view that duty is owed generally and any limitations on liability should be through “proximate cause,” in which “foreseeability” must necessarily play a greater role than in the duty analysis. Writing for the dissent, Judge Andrews rejected the court’s view that the duties owed by a defendant were the particularized product of a relationship determined in part by foreseeability. “Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.” *Id.* at 103 (Andrews, J., dissenting). The *Palsgraf* dissent, like the dissent in this case, appears to contend that

consideration of a particular plaintiff's relation to an alleged wrongful act is better considered under the guise of proximate cause.

Although judges and scholars have long debated the relative merits of the two views, the gist of Chief Judge Cardozo's duty analysis has been widely embraced. *Compare* 3 HARPER ET AL., THE LAW OF TORTS § 18.2, at 654-55 (2d ed. 1986); RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965); Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 3-5 (1998); and Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 472 (1950); with KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 287 (5th ed. 1984). The Restatement (Second) of Torts states:

In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons — as, for example, all persons within a given area of danger — of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965); *see also* 4 HARPER ET AL., *supra*, § 20.5, at 138 (the scope of a duty is limited to “(1) those persons that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent”). The result of this analysis is that “[a] plaintiff has no right of action unless there was a wrong relative to her or a violation of her right, and there is no such relational wrong or personal-rights violation in a negligence case where the duty to avoid foreseeable risk to the plaintiff has not been breached.” Zipursky, *supra*, at 15; *see also* *Nixon*, 690 S.W.2d at 551. A wrong in general is not enough; the plaintiff herself must be wronged. *See* Zipursky, *supra*, at 12.

When we consider whether a particular criminal act was so foreseeable and unreasonable as

to impose a duty upon a landowner, we first examine the particular criminal conduct that occurred in light of “specific previous crimes on or near the premises.” *Walker*, 924 S.W.2d at 377. If, after applying the *Timberwalk* factors of similarity, recency, frequency, and publicity, *see Timberwalk*, 972 S.W.2d at 756-57, we determine that the general danger of the criminal act was foreseeable, we then apply the second prong of the foreseeability analysis and determine whether it was foreseeable that the injured party, or one similarly situated, would be the victim of the criminal act. In essence, we consider whether the plaintiff was within the range of the defendant’s apprehension such that her injury was foreseeable. *See Palsgraf*, 162 N.E. at 99-100. Only when we have analyzed the criminal act within the context in which it occurred can we determine whether the landowner owed a duty to the injured party. *See, e.g., Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (when determining whether a duty lies, we must consider all “the facts surrounding the occurrence in question”).

Applying the *Timberwalk* factors, it was not unforeseeable as a matter of law that a rape might occur in the parking garage. Although no similar violent crimes had occurred in the parking garage before the attack on Holder, the summary judgment evidence shows that in the two years preceding the incident, 190 violent crimes, including rape and murder, were reported near the garage. This equates to a frequency of roughly one violent crime every four days.

While there is no evidence that any of these crimes received publicity and Mellon was not required to inspect police records to determine whether its garage was in a high crime area, the summary judgment evidence establishes that Mellon was aware that property crimes had occurred, including the theft of a Mellon employee’s car. Another Mellon employee complained to the garage manager “about the virtually non-existent security” in the garage, which compelled the employee to

seek an escort to her car when she worked late. Furthermore, Mellon knew that vagrants frequented the garage and sometimes drank there.

Together, these facts constitute some evidence that violent criminal conduct was foreseeable. But while it may have been foreseeable that a violent crime such as rape might occur, this does not end our analysis. We must also consider whether Holder was situated such that Mellon could foresee that she would be the victim of this third-party criminal act. *See Carey v. Pure Distrib. Corp.*, 124 S.W.2d 847, 849 (Tex. 1939); RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965). The facts of this case fall squarely within the second prong of the foreseeability analysis and show that Mellon could not have reasonably foreseen that its failure to secure the garage would lead to Holder's injuries.

Certainly, Mellon expected that its employees would use the garage, often at times when it would be relatively vacant and thus more dangerous. It is not unreasonable to conclude that Mellon could foresee that an employee or some other person who frequents the garage could be the victim of a violent crime in the garage. To protect these garage users, Mellon provided armed security patrols weekdays from 5:45 a.m. to 11:30 p.m., in addition to random patrols by off-duty police officers during business hours. Holder, however, was not a member of this class nor any other that Mellon could have reasonably foreseen would be the victim of a criminal act in its garage.

Unlike any foreseeable victim, Holder was pulled over in her car at 3:30 a.m. by a third party over whom Mellon had no control, and she was led from several blocks away to the actual crime scene. Not only did Mellon have no control over the criminal, Potter, it had no knowledge of him nor any reason to know that he would pick the garage as the scene of his reprehensible crime. Moreover, Mellon had no knowledge of Holder nor any reason to believe that she, or a person

similarly situated, could be subject to a crime on Mellon's property. It simply was not foreseeable, beyond a remote philosophic sense, that this tragic event would occur to Holder on Mellon's property. With relation to Mellon's allegedly wrongful act of not securing its garage at three in the morning, Holder was not so situated that injury to her might reasonably have been foreseen. She was, in short, beyond Mellon's reasonable apprehension.

Holder argues that Mellon knew that the condition of its garage created an unreasonable and extreme degree of risk that an attack such as this would occur. However, nothing in Holder's summary judgment evidence suggests that Mellon could have reasonably foreseen that its garage would be picked by Potter as the scene of his crime if it did not secure its garage. The mere fact that crimes are prevalent in downtown Houston is not enough. *See Timberwalk*, 972 S.W.2d at 756. Examining the evidence, it is true that Mellon was aware that a car had been stolen from its garage, but this does not indicate that the garage would be used as a place to bring Holder. It is also true that Mellon was aware that vagrants frequented the garage, but this does not suggest that it was a place that invited criminals to transport victims there. Holder's summary judgment evidence provides little more than "proof of negligence in the air." *Palsgraf*, 162 N.E. at 99. She provides no evidence of a foreseeable risk in relation to her.

In the end, Holder points again and again to the fact that Mellon was aware that cars could enter its garage without authorization. But to base foreseeability on this fact, without more, would effectively place a universal duty on any landowner with secluded property to prevent that property from becoming the scene of a crime. Whether it be a farmer's field, an industrial park, or a twenty-four-hour laundromat, placing a duty on landowners to prevent criminal acts on their property simply because criminals could gain access to their land would make landowners the insurers of crime

victims, regardless of the lack of connection between the landowner and either the victim or the perpetrator. “Courts across the country agree that an owner or possessor of property is not an insurer of the safety of those on the premises.” *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 59 (Tex. 1997) (Owen, J., concurring) (citing *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993); *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215-16 (Cal. 1993); and *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 487 (D.C. Cir. 1970)); *see also* RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (“[T]he possessor is not an insurer of the visitor’s safety . . .”).

Accordingly, Mellon owed no legal duty to Holder. To the extent that Mellon’s conduct may have created a risk of harm, it did not breach a duty to Holder because she was not so situated with relation to the wrongful act such that her injury might have been foreseen.

## II

The dissent implies that this analysis is inconsistent with *Nixon*. In *Nixon*, however, the Court did not discuss or analyze the common law aspects of duty. Instead, the Court held that the duty owed by the defendant was governed by an applicable ordinance. In doing so, the Court stated:

An ordinance requiring apartment owners to do their part in deterring crime is designed to prevent injury to the general public. R.M.V. falls within this class. Since the ordinance was meant to protect a larger class than invitees and licensees, and since R.M.V. committed no wrong in coming onto the property, these premises liability distinctions are irrelevant to our analysis.

*Nixon*, 690 S.W.2d at 549. Thus, the ordinance defined the scope of the second prong of foreseeability: “that the injured party should be so situated with relation to the wrongful act that

injury to him or to one similarly situated might reasonably have been foreseen.” *Id.* at 551 (citations omitted).

Moreover, in considering the foreseeability aspect of *proximate cause* in *Nixon*, the Court’s discussion and its use of italics make clear that it focused solely on the first prong of foreseeability: that “[i]t is not required that the particular accident complained of should have been foreseen. All that is required is that the injury be of such a *general character as might reasonably have been anticipated . . .*” *Id.* (citations omitted). In its proximate cause analysis, the *Nixon* Court did not discuss, italicize, or otherwise analyze the second prong of foreseeability. Thus, *Nixon* is inapposite to the analysis of this case.

The dissent also takes issue with this analysis of Mellon’s duty to Holder by claiming that it “improperly bootstraps proximate cause foreseeability into the threshold duty question.” \_\_\_ S.W.2d at \_\_\_ (O’Neill, J., dissenting). The dissent does not explain, however, how the foreseeability analysis under “proximate cause” differs from the foreseeability analysis under “duty.” Additionally, the dissent does not explain why it was not similarly improper for this Court, and other courts, to frequently use a singular foreseeability analysis interchangeably between duty and proximate cause. Furthermore, the dissent does not explain why the second prong of the foreseeability analysis — that the injured party should be so situated with relation to the wrongful act that injury to her or to one similarly situated might reasonably have been foreseen — applies only to proximate cause foreseeability and not to duty foreseeability. The dissent cannot be faulted, however, for failing to answer these questions because Texas jurisprudence on these issues has been unclear. But the answer is simple: The “foreseeability” analysis is the same for both duty and proximate cause.

The questions of duty and proximate cause “are often used in a confused and overlapping way” because both rest on a determination of “foreseeability.” 3 HARPER ET AL., *supra*, § 18.1, at 650; *see also Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) (proximate cause consists of cause-in-fact and foreseeability); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (main determinant of duty is foreseeability). The confusion can be found, for example, in *Nixon*. There, foreseeability was analyzed only under the heading of “proximate cause” because the Court determined at the outset that the defendant owed the plaintiff a duty imposed by statute. *See Nixon*, 690 S.W.2d at 549. Yet, in defining “foreseeability” as applied to the case, the Court cited a case dealing exclusively with proximate cause, *Missouri Pacific Railroad v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977); a case dealing only with duty, *Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60, 64 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.); and another dealing with both, *Walkoviak v. Hilton Hotel Corp.*, 580 S.W.2d 623, 625, 628 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.). *See Nixon*, 690 S.W.2d at 550.

The confusion has been perpetuated since *Nixon*. In *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996), and *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993), this Court considered foreseeability as it relates to duty. In doing so, the Court cited to the *Nixon* foreseeability analysis, which, as has been noted, applied to proximate cause.

Interestingly, the court of appeals’ opinion in this case relies on *Nixon*’s discussion of foreseeability, as it was applied to causation, for support of its discussion of foreseeability as it applies to duty. 954 S.W.2d at 795. The court concluded that a duty was owed to Holder because, in part, her injury was foreseeable. *Id.* at 795. Turning to “proximate cause,” the court again considered whether Holder’s injury was foreseeable, but rather than repeat its analysis verbatim, the

court simply refers to its previous discussion of foreseeability under “duty.” *Id.* at 801. The court relies upon a single discussion of foreseeability to establish foreseeability’s requirements for both duty and proximate cause. Neither the court of appeals in this case nor this Court in *Nixon*, *Walker v. Harris*, and *Exxon Corp. v. Tidwell*, were wrong for relying upon law that establishes a foreseeability standard that applies to both duty and proximate cause because the standard is the same. Consistent with that approach, it is entirely proper for the Court to apply the foreseeability standard stated in *Nixon* to the duty analysis in this case.

---

GREG ABBOTT  
JUSTICE

OPINION DELIVERED: September 9, 1999